

for a waiver of the Television Duopoly Rule is obliquely alluded to, but even then it is only a pledge to make such a request in the future. Marquette Application at Exhibit B. However, and of utmost significance, the Marquette Application does not include the request for a waiver of the Television Duopoly Rule necessary to prevent the application from running afoul of the Inconsistent Application Rule as to the Ishpeming Application, the Calumet Application, and the Cranston Application. In addition, because there is predicted City Grade contour overlap between the Ishpeming Application and the Marquette Application of **97%**, Grade A overlap of the **99.9%**, and Grade B overlap of **100%**, the two applications "serve the same community," and the filing of the Marquette Application thus violates the Multiple Application Rule.<sup>13/</sup>

9. Scanlan's intent to "request an appropriate waiver of the Commission's multiple ownership rules at the appropriate time" or to "take such steps as are necessary to comply with the Commission's multiple ownership rules then in effect," Marquette Application at Exhibit B, cannot rectify the violations of the Inconsistent Application Rule and the Multiple Application Rule. The Commission has said that "such an amendment cannot correct a vio-

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<sup>13/</sup> Moreover, this pattern of filing the various inconsistent and multiple applications described above seriously calls into question Scanlan's qualifications as to its character to be a Commission licensee. It is clear from the above discussion, and painfully obvious from the Engineering Statement and the Coverage Map, that the four applications Scanlan has filed could never all be granted by the Commission, even had each application contained the necessary waiver requests. The Commission would never allow one broadcaster to so dominate a region in the manner sought by Scanlan's four applications, for to do so would both violate and profoundly undermine the Commission's multiple ownership rules. This is particularly true as to the Ishpeming Application and the Marquette Application, whose predicted contours are practically co-extensive. It is thus impossible to accept that Scanlan had a good faith belief that, taken together the four applications discussed herein were legitimately filed, particularly to the extent that most of the applications failed either to recognize some of the contour overlaps between the various applications or to request all the waivers of the Television Duopoly Rule necessary for the applications to even be acceptable for filing.

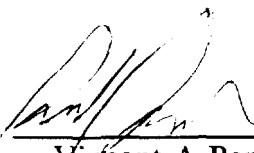
lation which has already occurred" for the gravamen of the violation of those rules is "*the filing of the inconsistent application itself* and such a violation can never be cured by subsequent amendment because the act of filing cannot be undone." Big Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987) (emphasis in original). The bottom line is that Scanlan's Crandon Application and Marquette Application were inconsistent with the pending Ishpeming Application and Calumet Application when filed, as well as with each other, and no waiver request was included in either of the two last-filed applications. As such, the only appropriate remedy is the dismissal of both the Crandon Application and the Marquette Application. See Premier Broadcasting, Inc., 7 FCC Rcd 867, 870 (1992) ("when a violation of the inconsistent application rule occurs, the appropriate action is the dismissal of the latest filed application"); see also Atlantic Radio Communications, Inc., 7 FCC Rcd 5105, 5106 (1992) ("we cannot allow applicants to choose which of two inconsistent applications they want to pursue").

Conclusion

For the foregoing reasons, Scanlan's Crandon Application and Marquette Application must be dismissed.

Respectfully Submitted

**MARIO F. IACOBELLI**

By:   
\_\_\_\_\_  
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April 3, 1996

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*Jules Cohen, P.E.*  
*Consulting Engineer*

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**ENGINEERING STATEMENT  
ANALYSIS OF OVERLAPS  
SCANLAN TELEVISION, INC. APPLICATIONS**

Scanlan Television, Inc. ("Scanlan") has pending television construction permit applications for four locations: Crandon, Wisconsin (BPCT-950915KI), Marquette, Michigan (BPCT-960111KO), Calumet, Michigan (BPCT-950412KF), and Ishpeming, Michigan (BPCT-941116KH). Substantial overlaps, as high as one hundred percent, exist among the calculated coverage contours of these applications. The extent of the overlaps is described in this engineering statement.

The parameters of the operations proposed by Scanlan are shown in the following table.

<b>Location</b>	<b>Channel</b>	<b>ERP (kW)</b>	<b>HAAT (meters)</b>	<b>Coordinates (° - ' - ")</b>
Crandon, WI	4	100	549	45-22-06 N 89-16-55 W
Marquette, MI	19	1,000 (DA)	300	46-21-10 N 87-51-15 W
Calumet, MI	5	100 (DA)	295	47-02-12 N 88-41-42 W
Ishpeming, MI	10	316	347	46-26-21 N 88-03-01 W

Primary City, Grade A and Grade B contours calculated as prescribed in Section 73.684 of the Commission's rules are shown on the map included herein as Figure 1. To

*Jules Cohen, P.E.*  
*Consulting Engineer*

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Engineering Statement  
Scanlan Overlap Analysis

Page 2

avoid cluttering the map with labels, each contour is not identified; however, in each instance, the outer contour is the Grade B, the next contour is the Grade A, and the innermost contour is the Primary City (or Principal Community). The contours were generated by a computer program that calculates the 3.1-to-16.2 kilometer average terrain height at one-degree azimuth intervals, then uses the appropriate effective radiated power (ERP) in conjunction with digitized FCC field strength curves to establish contour distances.

The results of analyses of population and area overlaps are shown in Figure 2 herein. Not only are overlaps found between pairs of stations, but in twelve areas as many as three proposed station contours are found to overlap. The three-station overlap analysis can be found on Sheet 2 of Figure 2.

Populations were all determined by computer using 1990 U.S. Census data. Areas were measured with a compensating polar planimeter, taking into account the appropriate map scale factor.

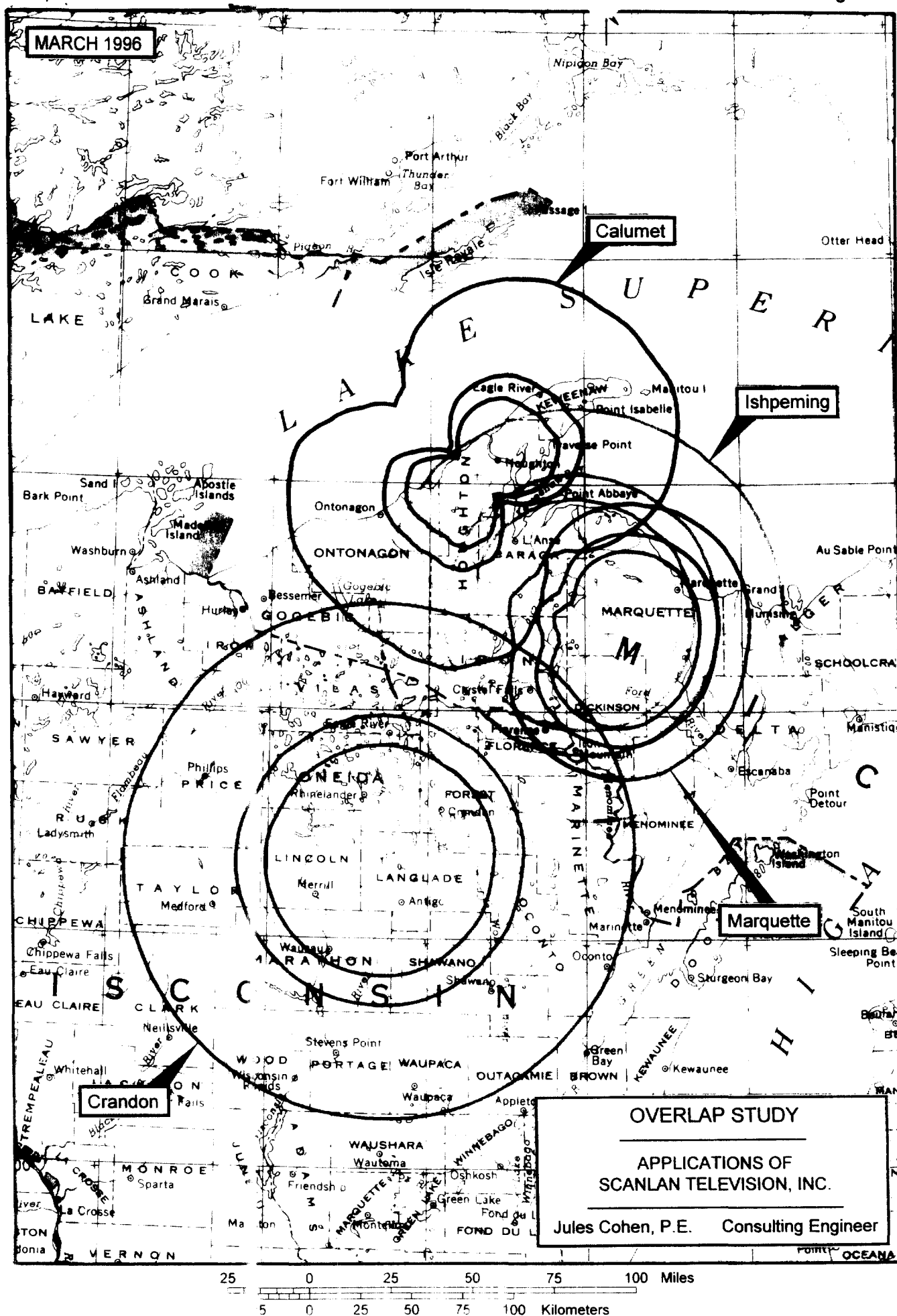
I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 22, 1996.

A handwritten signature in cursive script, reading "Jules Cohen".

Jules Cohen, P.E.

Figure 1



**COVERAGE AND OVERLAP ANALYSIS OF PROPOSED STATIONS  
SCANLAN TELEVISION, INC.**

CRANDON, WI CH 4												
	Primary City				Grade A				Grade B			
	Population	%	Area	%	Population	%	Area	%	Population	%	Area	%
	141,255	100.0	9,852	100.0	196,356	100.0	15,482	100.0	608,622	100.0	48,695	100.0
					00,196							
Overlap With												
Calumet B									752	0.1	1,732	3.6
Ishpeming City									5,797	1.0	1,411	2.9
Ishpeming A									19,581	3.2	2,732	5.6
Ishpeming B					00,749	0.4	726	4.7	51,929	8.5	7,772	16.0
Marquette City									384	0.1	101	0.2
Marquette A									1,171	0.2	514	1.1
Marquette B									34,317	5.6	16,13	3.3
CALUMET, MI CH 5												
	Primary City				Grade A				Grade B			
	Population	%	Area	%	Population	%	Area	%	Population	%	Area	%
	36,554	100.0	3,085	100.0	38,774	100.0	5,484	100.0	54,436	100.0	23,892	100.0
Crandon B									752	1.4	1,732	7.2
Ishpeming City					00,081	0.2	111	2.0	6,905	12.7	2,803	11.7
Ishpeming A	982	2.7	0,302	9.8	01,509	3.9	827	15.1	8,845	16.2	4,647	19.5
Ishpeming B	35,860	98.1	2,520	81.7	37,594	97.0	3,750	68.4	47,833	87.9	11,099	46.5
Marquette B									235	0.4	1,210	5.1
ISHPEMING, MI CH 10												
	Primary City				Grade A				Grade B			
	Population	%	Area	%	Population	%	Area	%	Population	%	Area	%
	36,554	100.0	3,085	100.0	38,774	100.0	5,484	100.0	54,436	100.0	23,892	100.0
Crandon A									00,749	1.4	726	3.0
Crandon B	5,797	15.9	1,411	45.7	19,581	50.5	2,732	49.8	51,929	95.4	7,772	32.5
Calumet City					982	2.5	302	5.5	35,860	65.9	2,520	10.5
Calumet A	81	0.2	111	3.6	1,509	3.9	827	15.1	37,594	69.1	3,750	15.7
Calumet B	6,905	18.9	2,803	90.9	8,845	22.8	4,647	84.7	47,833	87.9	11,099	46.5

COVERAGE AND OVERLAP ANALYSIS OF PROPOSED STATIONS - Continued												
SCANLAN TELEVISION, INC.												
MARQUETTE, MI CH 19												
	Primary City				Grade A				Grade B			
	Population	%	Area	%	Population	%	Area	%	Population	%	Area	%
	68,834	100.0	4,768	100.0	73,298	100.0	7,077	100.0	110,413	100.0	12,500	100.0
Crandon B	384	0.6	101	2.1	1,171	1.6	514	7.3	34,317	31.1	1,613	12.9
Ishpeming City	66,736	97.0	4,496	94.3	67,938	92.7	5,676	80.2	72,719	65.9	7,440	59.5
Ishpeming A	68,834	100.0	4,768	100.0	73,250	99.9	7,026	99.3	84,188	76.2	9,768	78.1
Ishpeming B	68,834	100.0	4,768	100.0	73,298	100.0	7,077	100.0	110,413	100.0	12,500	100.0

THREE-STATION OVERLAP ANALYSIS				
SCANLAN TELEVISION, INC.				
Contour 1	Contour 2	Contour 3	Population	Area
Crandon B	Calumet B	Ishpeming B	744	1,391
Crandon B	Calumet B	Ishpeming A	57	544
Crandon B	Calumet B	Ishpeming City	39	282
Crandon B	Marquette B	Ishpeming City	5,156	958
Crandon B	Marquette B	Ishpeming A	11,509	1,472
Crandon B	Marquette B	Ishpeming B	34,317	1,673
Crandon B	Marquette A	Ishpeming A	1,171	514
Crandon B	Marquette A	Ishpeming City	910	433
Crandon B	Marquette City	Ishpeming City	384	101
Calumet B	Marquette B	Ishpeming City	235	847
Calumet B	Marquette B	Ishpeming A	235	1,210
Calumet B	Marquette A	Ishpeming City	0	60
Notes:				
1. Populations 1990 U.S. Census				
2. Areas in Square Kilometers				



**CERTIFICATE OF SERVICE**

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "Petition to Deny" was served by U.S. mail, first-class, postage prepaid on the 4th day of April, 1996, upon the following individuals:

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Washington, DC 20006  
(Counsel to William E. Kring)

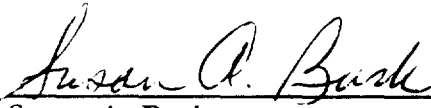
  
\_\_\_\_\_  
Susan A. Burk

EXHIBIT B

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re Applications of	)	
	)	
SCANLAN TELEVISION, INC.	)	
	)	
For Permit to Construct	)	FCC File No. BPCT-950915KI
New Television Station at	)	
VHF Channel 4,	)	
Crandon, Wisconsin	)	
	)	
For Permit to Construct	)	FCC File No. BPCT-960111KO
New Television Station at	)	
UHF Channel 19,	)	
Marquette, Michigan	)	

TO: Chief, Video Services Division

**SUPPLEMENT TO PETITION TO DENY**

Mario F. Iacobelli ("Petitioner"), an applicant for Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan,<sup>1/</sup> by his attorneys, pursuant to authority granted by the Commission in response to his Motion for Leave to File Supplement to Petition to Deny filed this date, hereby responds to the new, material information contained in amendments filed April 5, 1996, modifying the above-referenced applications. Because the amendments do not in any way negate the reasons for which the above-referenced applications are unacceptable for filing, the Commission must dismiss both applications, in support of which the following is respectfully submitted:

1. *Background.* Scanlan currently has pending before the Commission applications for construction permits for new commercial television stations for Channel 10, Ishpeming, Michigan ("Ishpeming Application"),<sup>2/</sup> Channel 4, Crandon, Wisconsin ("Crandon Applica-

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<sup>1/</sup> Applications for which were filed on April 3, 1996.

<sup>2/</sup> FCC File No. BPCT 941116KH.

tion"),<sup>3/</sup> and Channel 19, Marquette, Michigan ("Marquette Application").<sup>4/</sup> In addition, Scanlan has recently had his application granted for a construction permit for Channel 5, Calumet, Michigan ("Calumet Application").<sup>5/</sup>

2. When originally filed, the Crandon Application acknowledged, at Exhibit A, the pendency of the Ishpeming Application and the Calumet Application but it did not recognize the various contour overlaps<sup>6/</sup> that would exist between the facilities proposed by the Crandon Application and those proposed by both the Ishpeming Application and the Calumet Application.<sup>7/</sup> Nowhere in the Crandon Application did Scanlan request a waiver of the

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<sup>3/</sup> FCC File No. BPCT-950915KI.

<sup>4/</sup> FCC File No. BPCT-960111KO.

<sup>5/</sup> FCC File No. BPCT-950412KF. The Calumet Application was granted with the caveat that the satellite waiver request contained therein (due to the overlap between the Ishpeming Application and the Calumet Application) will be considered in connection with the Ishpeming Application. See Letter of March 6, 1996, from Barbara A. Kreisman, Chief, Video Services Division. In light of that caveat, the Commission granted the Calumet Application conditioned upon Scanlan constructing a main studio within its principal community contour due to the possibility that the Ishpeming Application may not be granted. Id. at 1 n.1. The Calumet Application was also granted without acknowledgment of the overlap with the Crandon Application. See infra; see also Petition to Deny at 3 n.9 and accompanying text.

<sup>6/</sup> All overlaps referred to in this Supplement may be verified by reference to the Engineering Statement appended to the Petition to Deny filed by Iacobelli on April 4, 1996 ("Petition to Deny").

<sup>7/</sup> The facilities proposed by the Crandon Application would create overlap between (1) the predicted Grade A contour of Crandon Channel 4 and the predicted Grade B contour of Ishpeming Channel 10, (2) the predicted Grade B contour of Crandon Channel 4 and the City Grade Contour of Ishpeming Channel 10, (3) the predicted Grade B contours of the Crandon and Ishpeming stations, and (4) the predicted Grade B contours of Crandon Channel 4 and Calumet Channel 5.

Television Duopoly Rule, 47 C.F.R. § 73.3555(b),<sup>8/</sup> even though that rule would otherwise prohibit common ownership of those three applications.

3. When originally filed, the Marquette Application acknowledged, at Exhibit B, the pendency of the three aforementioned applications, and stated that "[t]he Grade B contour of the station proposed in the Ishpeming Application would overlap the Grade B contour of the station proposed in th[e Marquette] Application," but it did not contain request for a waiver of the Television Duopoly Rule. Instead, the Marquette Application stated that "[a]t such time as the Ishpeming Application may be granted (or, if necessary, when it appears that the Ishpeming matter may proceed to hearing), Scanlan or its affiliate will take such steps as are necessary to comply with the Commission's multiple ownership rules then in effect." Id.

4. The Marquette Application further recognized that "[t]here is also a Grade B contour overlap between the station proposed in th[e Marquette] Application and the Calumet Station," id., yet the Marquette Application did not contain a request for a waiver of the Television Duopoly Rule. Instead, the Marquette Application stated that "[i]f Applicant becomes the licensee of the Calumet Station, it plans to operate the Calumet Station in tandem with the Marquette Station, and will, if necessary, request an appropriate waiver of the Commission's multiple ownership rules at the appropriate time." Id. The Marquette Application did not recognize that the predicted Grade B contour of the facilities specified in the Crandon Application would overlap with the predicted City Grade, Grade

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<sup>8/</sup> The Television Duopoly Rule states in relevant part:

No license for a TV broadcast station shall be granted to any party if the grant of such license will result in overlap of the Grade B contour of that station and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.

A and Grade B contours of the facilities specified in the Marquette Application, nor did it reveal that between the facilities specified in the Ishpeming Application and the facilities specified in the Marquette Application, the predicted *City Grade contour overlap* of the two stations would be 97%, the overlap between the Grade A contours of the stations would be 99.9%, and the overlap between the Grade B contours 100%.

5. On April 3, 1996, Mario F. Iacobelli filed applications for construction permits for new television stations for Channel 4, Crandon, Wisconsin, and Channel 19, Marquette, Michigan, that are mutually exclusive with, respectively, Scanlan's Crandon Application and Marquette Application. On April 4, 1996, Mario F. Iacobelli filed a Petition to Deny the Crandon Application and the Marquette Application on grounds that they violated the Commission's Inconsistent Application Rule, 47 C.F.R. § 73.3518, and Multiple Application Rule, 47 C.F.R. § 73.3520 due to their failure to include requests for waivers of the various unrecognized contour overlaps set forth above. On April 5, 1996, Scanlan filed amendments to the Crandon Application ("Crandon Amendment") and the Marquette Application ("Marquette Amendment").<sup>9/</sup>

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<sup>9/</sup> Both the Crandon Amendment and the Marquette Amendment claim that the necessity of requesting Television Duopoly Rule waivers came to Scanlan's attention only when Iacobelli filed the Petition to Deny. Given the proximity of the communities of license of the four applications involved, and given that the same engineer prepared all four applications for an experienced broadcast licensee, to be reviewed and filed by a law firm with a wealth of experience in FCC matters, it is hard to countenance that the predicted contour overlaps cited in the Petition to Deny came as a surprise to anyone involved with the Crandon Application and the Marquette Application. Moreover, such an rationalization stretches the bounds of plausibility with regard to the overlap between the Ishpeming Application and the Marquette Application given that the two cities are approximately but 15 miles apart.

The above sense of incredulity is bolstered by Scanlan's manifest willingness to play fast and loose with the Commission's Rules, see Petition to Deny at 7 n.13, which is further demonstrated in the Crandon Amendment and the Marquette Amendment. Despite filing the amendments, Scanlan still refuses to bring the applications into full compliance with the

(continued...)

6. *Discussion.* The Crandon Application and the Marquette Application clearly violate the Inconsistent Application Rule and/or the Multiple Application Rule, as is demonstrated by both the Petition to Deny (which Petitioner incorporates here by reference) and Scanlan's response thereto. The Crandon Amendment and the Marquette Amendment filed in response to the Petition to Deny, however, cannot rectify the Inconsistent Application Rule and the Multiple Application Rule violations. The Commission has said that "such an amendment cannot correct a violation which has already occurred" for the gravamen of the violation of those rules is "*the filing of the inconsistent application itself* and such a violation can never be cured by subsequent amendment because the act of filing cannot be undone." Big Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987) (emphasis in original). All that matters is that Scanlan's Crandon Application and Marquette Application were inconsistent with the pending Ishpeming Application and Calumet Application when filed, as well as with each other, and no waiver request was included in either of the two last-filed applications. As such, the only appropriate remedy is the dismissal of both applications. Premier Broadcasting, Inc., 7 FCC Rcd 867, 870 (1992) ("when a violation of the inconsistent application rule occurs, the appropriate action is the dismissal of the latest filed application"). This is particularly true of the Marquette Application, which proposes facilities that would result in City Grade contour overlap between the Ishpeming Application and the Marquette Application of 97%,

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<sup>2/</sup> (...continued)

Commission's Rules currently in effect (largely because doing so is impossible, see infra); this is particularly true to the extent that (1) the contours of the Ishpeming Application and the Marquette Application are practically co-extensive, and (2) the facilities in both those applications have been specified as the parent station to Scanlan's Calumet satellite. More importantly, it is notable that (1) the amendment certification *signed by Scanlan* was faxed to him on April 2, 1996, two days before the filing of the Petition to Deny which Scanlan claims put him on notice of the various unrecognized overlaps between applications, and (2) Scanlan, a Michigan resident, somehow managed both to sign that certification and have it filed in Washington on the same day, April 5, 1996.

Grade A overlap of 99.9% and Grade B overlap of 100%. Atlantic Radio Communications, Inc., 7 FCC Rcd 5105, 5106 (1992) ("we cannot allow applicants to choose which of two inconsistent applications they want to pursue").

7. Even if it were possible to remedy violations of the Inconsistent Application Rule or Multiple Application Rule via *post hoc* amendments to the offending applications, the Crandon Amendment and the Marquette Amendment sail wide of the mark. First, both amendments suggest that the Applications would be acceptable if the Commission amended its multiple ownership rules to prohibit only City Grade and Grade A overlap, and to allow Grade B overlap, between commonly owned stations. See In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, ¶ 116, MM Docket No. 91-221, MM Docket No. 87-8 (released January 17, 1995). What Scanlan's suggestion basically amounts to, however, is the functional equivalent of stating, "if the law were different, we wouldn't be in violation of it." The bottom line is that the Crandon Application and the Marquette Application did not conform to the rules then in effect, *and still in effect*, at the time the applications were filed, and they did not include all the necessary requests for waivers of those rules; thus, the applications must be dismissed. By making reference to the Commission's consideration of a proposal to change the Television Duopoly Rule to justify the acceptability of the Crandon Application and the Marquette Application, Scanlan's amendments succeed only in completing the hat trick by creating a violation of the Contingent Application Rule, 47 C.F.R. § 73.3517, as well.<sup>10/</sup>

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<sup>10/</sup> In addition, even if the Commission adopts and enacts a proposal to relax the Television Duopoly Rule to permit Grade B contour overlap between commonly owned stations, it would not resolve Scanlan's problem of (1) the predicted Grade A contour of Crandon Channel 4 overlapping the predicted Grade B contour of Ishpeming Channel 10, (2) the predicted Grade A contour of Ishpeming Channel 10 overlapping (by 99.9%) the predicted Grade A contour  
(continued...)



8. Second, as to the Marquette Application, Scanlan continues to ignore both the 99.9% Grade A overlap and the 97% City Grade overlap between the predicted contours of the Ishpeming Application and the Marquette Application, overlaps which the Commission is highly unlikely to treat favorably should a waiver be requested. See Petition to Deny at 5, 7. Rather, Scanlan acknowledges only that the predicted Grade B contours of the Ishpeming Application and the Marquette Application overlap. Marquette Amendment at 5. Moreover, to support the acceptability of the Marquette Application, Scanlan offers the facts that the Ishpeming Application is subject to three mutually exclusive applications<sup>11/</sup> and that the Commission is currently unable to hold comparative hearings to resolve mutually exclusive proceedings. Id. Such a proffer, however, is both irrelevant in that it does not change the fact that the Ishpeming Application and the Marquette Application are entirely inconsistent under the Commissions Rules, and specious in that the Marquette Application is just as burdened by mutually exclusive applications<sup>12/</sup> as the Ishpeming Application.<sup>13/</sup> Finally, the Marquette Amendment does not reconcile the fact that Scanlan has now sought satellite authorization for the Calumet Application by specifying both Ishpeming Channel 10 and Marquette Channel 19 as the parent station.

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<sup>10/</sup> (...continued)

of Marquette Channel 19, or (3) the predicted City Grade contour of Ishpeming Channel 10 overlapping (by 97%) the predicted Cited Grade contour of Marquette Channel 10.

<sup>11/</sup> Application of Uhlmann/Latshaw Broadcasting, L.L.C., FCC File No. BPCT-941107KH; Application of William E. Kring, FCC File No. BPCT-950315KI; Application of Harold Berry, FCC File No. BPCT-950320KJ.


<sup>12/</sup> In addition to Petitioner's application for Marquette Channel 19, Redwood Broadcasting, Inc., filed an application for Marquette Channel 19 on April 5, 1996.

<sup>13/</sup> Scanlan was aware or should have been aware of this state of affairs at the time the Marquette Amendment was drafted. The Marquette Amendment was filed April 5, 1996, two days after Iacobelli's application for Channel 19, and one day after the Petition to Deny which referenced Iacobelli's application for Channel 19.

*Conclusion.* Scanlan's act of filing the Crandon Amendment and the Marquette Amendment simply cannot, under Commission precedent, remedy the violations of the Inconsistent Application Rule and the Multiple Application Rule which occurred at the moment of filing the Crandon Application and the Marquette Application. Moreover, the Crandon Amendment and the Marquette Amendment do little, if anything, substantively to remove the taint of the Television Duopoly Rule violations which render the Crandon Application and the Marquette Application unacceptable for filing. Mario F. Iacobelli therefore respectfully requests that both those applications be dismissed.

Respectfully Submitted,

**MARIO F. IACOBELLI**

By:   
\_\_\_\_\_  
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Its Attorney

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April 10, 1996

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**CERTIFICATE OF SERVICE**

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "Supplement to Petition to Deny" was served by U.S. mail, first-class, postage prepaid on the 10th day of April, 1996, upon the following individuals:


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Susan A. Burk

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EXHIBIT C

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of	)	
	)	
SCANLAN TELEVISION INC.	)	
	)	
For Permit to Construct a	)	FCC File No. BPCT-950915KI
New Television Station at	)	
VHF Channel 4,	)	
Crandon, Wisconsin	)	
	)	
For Permit to Construct a	)	FCC File No. BPCT-960111KO
New Television Station at	)	
VHF Channel 19,	)	
Marquette, Michigan	)	

TO: Chief, Video Services Division

**OPPOSITION TO PETITION TO DENY**

Scanlan Television, Inc. hereby files this Opposition to Petition to Deny in response to the Petition to Deny the above-referenced applications filed by Mario F. Iacobelli ("*Iacobelli*") on April 4, 1996 and the Supplement to Petition to Deny filed by Iacobelli on April 10, 1996.

**BACKGROUND**

Marquette, Michigan is the largest city in Michigan's Upper Peninsula, which, as a general matter, continues to suffer from a lack of local television service. The Upper Peninsula has only three non-satellite stations on air--WLUC-TV and WNMU-TV (a noncommercial station), each licensed to Marquette and WDHS-TV (primarily a religious station), licensed to Iron Mountain. Viewers in Marquette currently only receive one local commercial service (from WLUC-TV). The other commercial service that reaches

Marquette is WJMN-TV, Escanaba, Michigan, which offers satellite service from WFRV-TV, Green Bay, Wisconsin.

For nearly two years, Scanlan has sought to further the public interest by initiating badly needed television service to viewers in the Upper Peninsula. Scanlan has, for example, been granted a construction permit for a new television station on Channel 5 in Calumet, Michigan (the "*Calumet Station*"). Once constructed, the Calumet Station will bring first television service to viewers in Calumet and throughout the Keweenaw Peninsula.

Scanlan has also sought to initiate television service for viewers in the Marquette/Ishpeming area. In November 1994, Scanlan filed an application (the "*Ishpeming Application*") to construct a television station on Channel 10 in Ishpeming, Michigan (the "*Ishpeming Station*"). Three competing applications were filed in the Ishpeming proceeding, including the application of William E. Kring, the Vice President, Secretary, Treasurer and Chief Financial Officer of Heritage Broadcasting Group, Inc., a corporation 99% owned by Iacobelli.<sup>1</sup> Because the Commission is currently unable to conduct comparative hearings to resolve mutually exclusive applications, initiation of new television service to viewers in Ishpeming on Channel 10 has been indefinitely delayed.

Recognizing that the Ishpeming proceeding could be stalled for many years, Scanlan began to consider other alternatives that would result in the initiation of new

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1. See Exhibit 1 to the Application of Mario Iacobelli to construct a television station on Channel 19 in Marquette, Michigan (BPCT 960403KJ) (the "*Iacobelli Application*"). Heritage Broadcasting Group, Inc. is, in turn, the 100% owner of Heritage Broadcasting Company, licensee of stations WWTV, Cadillac, Michigan and WWUP, Sault Ste. Marie, Michigan. *Id.* Kring is also the Vice President, Secretary, Treasurer and Chief Financial Officer of Heritage Broadcasting Company. *Id.*

television service to viewers in the Marquette/Ishpeming area. Channel 19 has been allotted for commercial use in Marquette, Michigan for 26 years<sup>2/</sup> and, to date, no television station has been constructed on Channel 19.<sup>3/</sup> Given the historical lack of interest in Channel 19 and the availability of other UHF allotments to Marquette, Michigan, Scanlan concluded that there existed the possibility of expediting the provision of new television service to viewers in the Marquette/Ishpeming area by filing an application (the "*Marquette Application*") to construct a television station on Channel 19 in Marquette (the "*Marquette Station*"). Scanlan did not, however, file the Marquette Application until after (1) counsel for Scanlan had consulted with the Commission's staff regarding the permissibility of filing the Marquette Application during the pendency of the Ishpeming proceeding and (2) the Commission's staff had advised counsel for Scanlan that, under the circumstances, the application would be appropriate.

Iacobelli, through his ownership of Heritage Broadcasting Company, is the main competitor of Scanlan Communications, Inc., an affiliate of Scanlan's which owns television stations in the Traverse City, Michigan and Sault Ste. Marie, Michigan markets. In what appears to be an attempt to thwart competition rather than serve the public interest, Iacobelli has filed a competing application for Channel 19 despite the availability of other UHF channels to be allotted to Marquette. Iacobelli has also filed a Petition to Deny (the "*Petition*") as well as a Supplemental Petition to Deny (the "*Supplement*") the Marquette

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2. See *In re Amendment of Section 73.606(B) of the Commission's Rules and Regulations, Television Table of Assignment (Marquette, Mich.)*, 22 F.C.C. 2d 922 (1970).

3. Only one construction permit for channel 19 has been issued by the Commission--to Upper Peninsula Telecasting Corp. in 1989 (FCC File No. BPCT-870331LY)--and that construction permit was dismissed on June 22, 1994.

Application and another application filed by Scanlan to construct a television station on Channel 4 in Crandon, Wisconsin (the "*Crandon Station*"). The Petition and Supplement rely almost exclusively for legal substance on a misinterpretation of the rationale behind the Commission's Inconsistent Application Rule. The Petition and Supplement were not filed, however, solely for the purpose of opposing the merits of Scanlan's application to construct the Marquette Station and the Crandon Station; instead they serve as a convenient platform for Iacobelli to launch false, spurious and utterly uninformed allegations designed to question Scanlan's integrity.

**I. THE FILING OF THE MARQUETTE APPLICATION DURING THE PENDING OF THE ISHPEMING APPLICATION DID NOT VIOLATE THE INCONSISTENT APPLICATION RULE**

In the Petition and Supplement, Iacobelli relies almost entirely on the Inconsistent Application Rule, 47 C.F.R. 73.3518 for the proposition that the application for the Marquette Station was, when filed, "inconsistent" with the Ishpeming Application and applications that Scanlan had outstanding to construct television stations in Calumet (the "*Calumet Application*") and Crandon (the "*Crandon Application*"). Iacobelli's argument lacks merit and reflects a fundamental misunderstanding of the rationale behind the Inconsistent Application Rule.

The primary focus of the Petition and Supplement is on the predicted City Grade, Grade A and Grade B overlap of the Marquette Station with the Ishpeming Station. Iacobelli contends that due to the extent of these overlaps, the Commission would not grant both the Ishpeming Application and the Marquette Application. Therefore, Iacobelli argues,



the Marquette Application should be dismissed under the Inconsistent Application Rule.

The argument lacks merit.

Prior to filing the Marquette Application, counsel for Scanlan discussed with the Commission's staff the possibility of Scanlan's filing the Marquette Application while the Ishpeming Application was pending. Counsel for Scanlan raised the question of whether, in light of the Commission's current inability to process the mutually exclusive applications for the VHF Ishpeming Station,<sup>4</sup> the public interest would be served by a proposal to initiate television service on the long vacant Channel 19 allotment to Marquette. The Commission's staff informed counsel for Scanlan that under the circumstances, the Marquette Application would indeed appear to serve the public interest notwithstanding the contour overlaps between the Ishpeming Station and the Marquette Station.

The tentative conclusion of the Commission's Staff that the filing the Marquette Application during the pendency of the Ishpeming proceeding was permissible is fully consistent with the rationale behind the Inconsistent Application Rule. As the Commission reasoned in *In re Application of Big Wyoming Broadcasting Corp.*, 2 F.C.C.Rcd. 3493, 3494 (1987) (quoting *Valle Broadcasting Co.*, 58 R.R. 2d 945 (1985)), a decision heavily relied on by Jacobelli, the Inconsistent Application Rule is designed to "avoid the waste of Commission resources, prejudice to other applicants, and delay of service to the public which arises when the Commission must process applications by the same person or entity, not all of which can be granted." The filing of the Marquette Application clearly did not

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4. In *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), the D.C. Circuit concluded that the comparative criteria used by the Commission in comparative proceedings were unlawful. Because the Commission has not adopted comparative criteria in accordance with the *Bechtel* decision, the Commission is currently unable to conduct comparative proceedings.